

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER MICHAEL ATKINSON,

Defendant and Appellant.

C061750

(Super. Ct. No. T080224F)

A jury convicted defendant of burglary (Pen. Code, § 459),¹ corporal injury to a former cohabitant (§ 273.5, subd. (a)), making criminal threats (§ 422), and interference with a wireless communication device (§ 591.5). Placed on probation, defendant appeals. He contends the trial court prejudicially erred in failing to instruct the jury sua sponte that defendant could not be convicted of burglary if he had an unconditional possessory right to enter the building burglarized and his trial

¹ Unless otherwise stated, all statutory references are to the Penal Code.

counsel was ineffective in failing to request such an instruction. Since the evidence failed to show defendant had such an unconditional possessory right to enter the building, we find no error and affirm.

FACTS

Defendant has known Kurina Cota since they were children. In 2005, they became romantically involved and moved in together in Reno. In 2007, they moved to Truckee and lived at her residence on Sierra Drive. They subsequently broke up and then got back together. Defendant did not move back into Cota's house, but stayed there often. He maintained a separate residence in Reno with his mother. Defendant had a key to Cota's house; he never gave it back after they broke up and she did not ask for it back.

Defendant spent the night of April 3-4, 2008 at Cota's. The next evening defendant called the police from the driveway after an altercation with Cota. The police found Cota inside the house. She was crying and distraught. It was clear she had been drinking. Cota had several injuries to her chin, neck and chest. She had abrasions on her left hand and wrist and had a laceration on her right middle finger near the knuckle. She had a bite mark on her left forearm. The police photographed the injuries.

Cota told the police defendant choked her so hard she passed out. When she came to, he was gone and had taken her phone. She called him on another phone and demanded he bring back the phone and some money. When defendant returned, Cota

would not open the door. Defendant broke into the house and Cota ran to the bedroom and locked herself in the bathroom. Defendant got into the bathroom and grabbed her, telling her he was going to kill her. He threw her to the ground and strangled her. Earlier defendant had bitten her. She locked him out five times, but "he can get through any door." She told him she was going to call the police and defendant broke her phone. The tape of this interview with the police was played at trial.

At trial both Cota and defendant, who were still dating, downplayed the incident, emphasizing how drunk they were. Cota had asked the district attorney to drop the charges. She claimed the incident was a "joint thing" and she was just as much at fault as defendant. Cota denied defendant shoved her down or choked her. She admitted defendant bit her. She claimed she had a heat rash from drinking alcohol. Defendant denied hitting or choking Cota, but admitted he bit her. He described the incident as "a childish game of keep away." He called the police because he wanted a mediator.

DISCUSSION

Defendant contends the trial court erred in failing to instruct the jury sua sponte that defendant could not be convicted of burglary unless the jury found he did not have an unconditional possessory right to be in the house or room burglarized.

"The trial court must instruct even without request on the general principles of law relevant to and governing the case. [Citation.] That obligation includes instructions on all of the

elements of a charged offense. [Citation.]” (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.)

The parties agree that one with an unconditional right to enter the building burglarized cannot be convicted of burglary. At common law, burglary was generally defined as “‘the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony.’ [Citation.]” (*People v. Gauze* (1975) 15 Cal.3d 709, 711, italics omitted.) Currently, burglary is defined as the entry into any building, room or specified structure with the intent to commit a grand or petty larceny or any felony. (§ 459.) Despite the substantial changes to some of the common law elements of burglary, *Gauze* held that “two important aspects of that crime” remain: the entry must invade a possessory right in the building and it must be committed by one who has no right to be in the building. (*People v. Gauze, supra*, at p. 714.) Because the crime of burglary requires the invasion of a possessory right in a building, one cannot be found guilty of burglarizing one’s own home. (*Ibid.*) “[S]ince burglary is a breach of the occupant’s possessory rights, a person who enters a structure enumerated in section 459 with the intent to commit a felony is guilty of burglary *except* when he or she (1) has an unconditional possessory right to enter as the occupant of that structure or (2) is invited in by the occupant who knows of and endorses the felonious intent.” (*People v. Salemm* (1992) 2 Cal.App.4th 775, 781, original italics.)

The parties disagree, however, whether the unconditional possessory right serves as an element of or a defense to burglary. The Attorney General cites *People v. Felix* (1994) 23 Cal.App.4th 1385, 1397, which held consent to enter a building, which would include an unconditional possessory right to enter, is not an element of burglary, but a defense. Defendant relies on *People v. Gill* (2008) 159 Cal.App.4th 149, and *People v. Smith* (2006) 142 Cal.App.4th 923, in which the building at issue was a marital home. Both cases state: ““To sustain a burglary conviction, the People must prove that a defendant does not have an unconditional possessory right to enter his or her family residence. [Citation.]” [Citations.]’”² (*People v. Gill*, *supra*, at p. 159, quoting *People v. Smith*, *supra*, at p. 930.) In *Gill* and *Smith* the issue was the sufficiency of the evidence of burglary; neither case considered whether the lack of an unconditional possessory right to enter is an element of burglary on which the trial court must instruct. Defendant’s reliance on *Gill* and *Smith* is misguided because cases are not

² As authority for this statement, both *Gill* and *Smith* rely on *Fortes v. Municipal Court* (1980) 113 Cal.App.3d 704, which also did not address the elements of burglary. The issue in *Fortes* was whether the exception to the spousal privilege under Evidence Code section 972, subdivision (e)(2) applied. This court held for the exception to apply, the People had to prove the petitioner’s husband could have been convicted of burglary of the marital home and the People failed to carry that burden. (*Fortes v. Municipal Court*, *supra*, at pp. 713-714.) The parties had stipulated the residence was the marital home, there was no evidence of any current restrictions on the husband’s right to enter, and the court had determined the husband could not be held to answer on burglary charges. (*Id.* at p. 707.)

authority for propositions not considered. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 198.) We follow *Felix* and conclude the lack of an unconditional possessory right to enter is not an element of burglary on which the trial court must instruct.

Defendant contends the same duty to instruct sua sponte applies to a defense. "In the absence of a request for a particular instruction, a trial court's obligation to instruct on a particular defense arises 'only if [1] it appears that the defendant is relying on such a defense, or [2] if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" [Citations.]" (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1148.) Defendant did not rely on the defense that he had an unconditional possessory right to enter Cota's house. Therefore, the trial court had an obligation to instruct only if there was substantial evidence that defendant had an unconditional possessory right to enter Cota's house.

An unconditional possessory right to enter is the "right to exert control over property to the exclusion of others" or the "right to enter as the occupant of that structure." (*People v. Salemmme, supra*, 2 Cal.App.4th at pp. 779, 781.) Although defendant often stayed there, the evidence did not show he had a right to enter the house on Sierra Drive as an occupant, rather than a conditional right to enter as Cota's guest. There was no evidence defendant had a possessory interest in the house, that he was on the lease or title or paid rent. He referred to it as

"her residence." Both Cota and defendant testified defendant did not live there; he had a residence in Reno with his mother. Defendant explained he was working in Truckee and stayed with Cota rather than drive back to Reno. He had a key because he kept his key when they broke up and Cota never asked for it back.

There was no substantial evidence defendant had an unconditional right to enter the house on Sierra Drive. He had no right to enter after Cota locked him out. (See *People v. Abilez* (2007) 41 Cal.4th 472, 509 [although defendant may have been permitted in house, no consent to enter bedroom after fight with victim].) The trial court did not err in failing to instruct sua sponte on the right to enter as a defense to burglary.

Defendant next contends he was denied effective assistance of counsel because his trial counsel did not request an instruction on the right to enter defense and there was no tactical reason for his failure to do so.

"To establish ineffective assistance, defendant bears the burden of showing, first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him." [Citation.] (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052-1053; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687.) Since there was not substantial evidence to

support a defense based on defendant's unconditional possessory right to enter, he cannot make this showing. Counsel's failure to request the instruction was not objectively unreasonable because a trial court may properly refuse an instruction not supported by substantial evidence. (*People v. Burney* (2009) 47 Cal.4th 203, 246; *People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1046.)

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

SCOTLAND, P. J.

SIMS, J.